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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 64

EASTERN AIR LINES, INC.,

Petitioner,

—v.—

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION *et al.*,

Respondents.

REPLY OF EASTERN AIR LINES, INC. TO MEMORANDUM FOR THE UNITED STATES

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Atlanta, Georgia
September 8, 1965

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Eastern Air Lines, Inc. (Eastern) respectfully submits this reply to the memorandum which was filed by the Solicitor General on behalf of the United States pursuant to this Court's Order of May 17, 1965 inviting such a memorandum.

The Solicitor General has advanced succinctly and forcefully reasons why Eastern's petition for a writ of certiorari should be granted insofar as it seeks a ruling that the strike called by defendants in February 1961 was a violation of the Railway Labor Act as to which a federal court has jurisdiction to grant injunctive relief and damages. The Solicitor General takes no position on the merits of the question whether the strike—called because of a dispute to which Eastern was not a party—violated the Railway Labor Act. However, in support of Eastern's position that the Act was violated, the Solicitor General calls attention (Memorandum p. 5) to the fact that "the chief purpose of

the Railway Labor Act was to prevent strikes and the resulting disruption of the national transportation system", and states (Memorandum p. 9) the position of the National Mediation Board "that permitting employees to strike over another dispute at a time when a major dispute to which such employees are parties is going through the negotiation and mediation procedures of the Railway Labor Act, would lessen the likelihood of the parties resolving the major dispute", and that "allowing employees to strike about a dispute over which the Board has no jurisdiction while the Board is attempting to mediate a major dispute would tend to thwart the basic congressional plan of substituting negotiation and mediation for self-help in the resolution of labor disputes involving rail and air carriers." These factors give strong implicit support to Eastern's contention that the strike violated the Railway Labor Act.

We wish to re-emphasize the following two factors which we think even more strongly, and explicitly, demonstrate that the strike was unlawful:

(1) The *first* duty imposed by the Act on carriers and employees is (Section 2, First) "to exert every reasonable effort to make and maintain agreements . . . and to settle all disputes . . .". Clearly, the disruption of negotiations, mediation and the contractual employment relationship by calling an irresponsible strike over an extraneous issue is a violation of that statutory duty—both as to *making* and *maintaining* agreements. The plain statutory requirement "cannot be rendered nugatory" by denial of the judicial relief necessary to enforce it. *Virginian Railway* v. *System Federation No. 40,* 300 U. S. 515 (1937) and *Railroad Trainmen* v. *Chicago River & I.R.R.,* 353 U. S. 30 (1957).

(2) Section 5 of the Act specifically gives the National Mediation Board jurisdiction of "any labor emergency"

and "any . . . dispute not referable to" the Adjustment Board. Certainly, the strike called by defendants created a "labor emergency" and it involves a "dispute not referable to" any Adjustment Board. Thus, contrary to the suggestion of the Solicitor General (*e.g.*, Memorandum p. 10, ftn. 6), the Board had jurisdiction to "proffer its services" and seek a solution of the "labor emergency", and upon intervention by the Board Section 5 of the Act requires that "no change shall be made in . . . established practices in effect prior to the time the dispute arose." A strike over a foreign issue plainly is a change in "established practices" in effect before the strike.* Since, as the Solicitor General correctly states (Memorandum pp. 6-7), federal judicial power may be exerted to prevent strikes during Emergency Board proceedings, it may equally be used to prevent the conduct of defendants here involved.

For the foregoing additional reasons, as well as others stated in our petition for writ of certiorari, we believe the Solicitor General has properly recommended that the writ be issued by this Court.

We also concur emphatically with the Solicitor General's statement (Memorandum p. 8):

> "Although the Act is silent as to whether a strike over a representation dispute is permissible during the period when the Board is considering the dispute, the

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* We must respectfully disagree with the Solicitor General's statement (Memorandum p. 10) that "The only language which relates to strikes is the provision in Section 10 (45 U. S. C. 160) that, during the period from the creation of a Presidential Emergency Board in a major dispute to 30 days after it has made its report to the President, 'no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose' ". We think that the language of Section 5 even more clearly prohibits a strike during National Mediation Board mediatory efforts and, unlike the language of Section 10, the prohibition extends to changes in "established practices" —not merely "the conditions out of which the dispute arose."

> same considerations which led this Court to conclude that the Act prohibits strikes over major and minor disputes while Board procedures are being utilized would seem applicable to representation disputes, and to require the same negative conclusion."

We submit that, for the same reasons, the strike against Eastern—which was called "to force the National Mediation Board" to change the representation decision reached in the dispute at United Air Lines (R. 7, 9)—was violative of the Act and therefore subject to the jurisdiction of a federal court.

We urge that the writ not be limited in the manner suggested by the Solicitor General, as such limitation would disable the Court from following to their logical conclusion the rulings in *Machinists* v. *Central Airlines*, 372 U. S. 682 (1963) and *Republic Steel Corp.* v. *Charlie Maddox*, 379 U. S. 650 (1965). In those cases, the Court held that "substantive federal law applies to suits on collective bargaining agreements covered by §204 of the Railway Labor Act." We believe that the same principle requires the federal court to take jurisdiction to decide whether Eastern's contract with defendants under the Railway Labor Act was violated by the strike in February 1961. Since, as the Solicitor General and the National Mediation Board say (Memorandum p. 9), the union conduct here involved "would tend to thwart the basic congressional plan of substituting negotiation and mediation for self-help in the resolution of labor disputes involving rail and air carriers", we submit that the Court should issue the writ of certiorari in a form which would permit deterrence of such conduct upon the basis of a federal court ruling that the contract (required by and negotiated pursuant to federal law) has been violated. We respectfully submit

that the issue as to availability of such a deterrent is as important as the issue of deterrence through a finding of Railway Labor Act violation. If, as the Mediation Board says, the conduct of the defendants thwarts the purpose of the Act, the Court should not disable itself from providing any remedy which may be available.

For the same reasons, we urge that the writ of certiorari should permit the Court to act on Eastern's contention that federal court power may be exerted to prevent the unjustifiable interference by defendants with Eastern's rights and duties as a certificated air carrier under the Federal Aviation Act (see Eastern's Petition pp. 20-23).

CONCLUSION

We submit that the Solicitor General is correct in recommending that the writ of certiorari be granted, but we urge that the writ not be limited as suggested by the Solicitor General.

Respectfully submitted,

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